United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

76-6003

To be argued by
SOL BOGEN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-6003

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and THE CITY OF NEW YORK,

Plaintiffs-Appellees,

-against-

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Defendants-Appellants,

SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.

Defendants.

- -

LOCAL 28,

Third-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

- -

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

- -

On Appeal From The United States District Court
For The Southern District of New York

SUPPLEMENTAL BRIEF FOR DEFENDANTS-APPELLANTS

SOL BOGEN, ESQ.
Attorney for Defendants-Appellants,
Sheet Metal Workers International
Association, Local Union No. 28
and Local 28 Joint Apprenticeship
Committee

February 18, 1977

SOL BOGEN
ONE PENN PLAZA
NEW YORK, N. Y. 10001

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-6003

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and THE CITY OF NEW YORK,

Plaintiffs-Appellees,

-against-

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Defendants-Appellants,

SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

- -

LOCAL 28,

Third-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

- -

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

- -

On Appeal from the United States District Court
for the Southern District of New York

SUPPLEMENTAL BRIEF FOR DEFENDANTS-APPELLANTS

I.

PRELIMINARY STATEMENT OF THE CASE

This supplemental brief[1] is submitted on behalf of appellants, Sheet Metal Workers' International Association, Local Union No. 28 ("Local 28" or "Union") and the Local 28 Joint Apprenticeship Committee ("JAC"), pursuant to this Court's Order of Remand dated October 18, 1976 ("Remand Order")[2]. That Order, upon the application of plaintiffs-appellees, remanded the instant appeal to the United States District Court for the Southern District of New York (Werker, J.) for the purpose of hearing and deciding plaintiffs-appellees' application to modify the Affirmative Action Program and Order entered November 25, 1975 ("AAP&O") (A. 1373), the subject of this appeal.

Pursuant to the Remand Order, plaintiff-appellee, Equal Employment Opportunity Commission ("EEOC") submitted proposed revisions of the AAP&O to the district court. These proposed revisions, as well as revisions proposed by defendants-appellants, were referred by the district court for hearing and report to the Administrator.

---

1. Appellants' principal opening brief was served and filed on July 6, 1976 ("Opening Brief").

2. References are to the consecutively paginated supplemental appendices.

On December 21, 1976, the Administrator conducted a hearing on this matter and on December 30, 1976, the Administrator filed his report ("Administrator's Report") (A. 1778) with the district court. On January 19, 1977, the district court entered an order adopting the Administrator's Report and granting the revisions requested by EEOC to the extent approved by the Administrator. On the same date, the district court also entered the Revised Affirmative Action Program and Order ("Rev. AAP&O") setting forth such revisions (A. 1835).

The original AAP&O contained eight separate and distinct provisions, or groups of provisions, which appellants urged as improper to this Court. The Rev. AAP&O has deleted some of these provisions, thereby rendering this appeal moot as to those items. The Rev. AAP&O, however, continues a number of the provisions originally contained in the AAP&O, although in some instances modified, as hereinafter specified, and the propriety thereof continues to be before this Court.

II.

THE PROVISIONS OF THE AFFIRMATIVE ACTION PROGRAM AND ORDER WHICH ARE NO LONGER BEFORE THIS COURT

A. Inclusion of Pensioners in Calculation of Goals

Paragraph 2 of the AAP&O (A. 1374) sets forth the formula for the measurement of total union membership for purposes of applying the remedial racial goals prescribed in ¶ 1 of the AAP&O. That definition included pensioners who had worked at any time in the three years preceding the date of calculation, even if such employment occurred prior to their status as pensioners. Appellants, in their Opening Brief (Point I, pp. 7-11), urged that total union membership should include only those pensioners who were employed as sheet metal workers subsequent to becoming pensioners.

Paragraph 2(b) of the Rev. AAP&O (A. 1836-1837) contains the definition of "pensioner" proposed by appellants, thus rendering this issue moot.

B. Artificial Preference for Admission to Journeyman Status in Favor of Non-Whites

Paragraph 14 of the AAP&O (A. 1382) provided that, notwithstanding the administration of job-related,

non-discriminatory tests for admission of journeyman to Local 28, non-whites were to be admitted on a preferential basis without regard to actual test scores.

Appellants' Opening Brief (Point IV, p. 21) challenged this artificial preference for non-whites based on the same substantive grounds on which this Court earlier rejected any artificial preference in admission to the JAC Apprenticeship Program. See EEOC v. Local 28, Sheet Metal Workers', 532 F.2d 821, at 831 (2d Cir. 1976).

This artificial preference has been deleted from the Rev. AAP&O, and thus has been removed as an issue in this appeal.

III.

PROVISIONS OF THE REVISED AFFIRMATIVE ACTION PROGRAM AND ORDER WHICH APPELLANTS CONTINUE TO URGE AS UNREASONABLE AND IMPROPER

A. The Substitution of the Established Local 28 Examining Board with a Tri-Partite Board of Examiners Selected By the Administrator, the Plaintiffs And the Union, Respectively

Paragraph 13 of the AAP&O (A. 1381) provided for the substitution (and, in effect, the "bumping") of the existing Local 28 Examining Board by a Board of Examiners, consisting of three members to be appointed one each by Local 28, the Administrator, and plaintiffs.

This Court earlier held (EEOC v. Local 28, supra, 532 F.2d at 530) that the district court's direction to replace a white trustee on the JAC with a non-white constituted improper reverse discrimination. Accordingly, appellants vigorously objected to this parallel provision as being similarly impermissible--as well as being an unjustified and unwarranted infringement upon the internal operation of the Union. (Opening Brief, Point II, pp. 12-16).

Pursuant to ¶ 13 of the original AAP&O, plaintiffs and the Administrator exercised their powers of appointment

by designating two non-whites as members of the Board of Examiners. (Opening Brief, p. 13, fn. 9)[3]

Paragraph 10 of the Rev. AAP&O (A. 1841) continues the subject appointment provisions without change. For all of the reasons stated in the Opening Brief, Point II, pp. 12-16, appellants continue to urge that this provision is unreasonable, improper and erroneous.

---

3. Subsequent to the filing of appellants' Opening Brief, the district court, upon application of Local 28, removed the non-white appointed by plaintiffs on the basis that he was disqualified due to his position as a principal in a sheet metal firm. Memorandum and Order, entered July 8, 1976 (A.1865). The district court's decision did not address Local 28's objection that the appointments, as made, constituted impermissible, de facto reverse discrimination. As of this date, plaintiffs have not appointed a replacement for Mr. Saunders.

B. Procedure for Direct Admission to Journeyman Status Based on Experience in Lieu of Successful Completion of "Hands-On" Journeyman's Tests

Paragraph 15 of the AAP&O (A. 1382) created a totally new method for obtaining journeyman membership in Local 28, a method heretofore not available under the Union's Constitution and By-Laws--direct admission based on experience in lieu of a qualifications examination. This provision of the original AAP&O was, however, available preferentially only to non-whites, notwithstanding that the non-whites to be benefited were not identifiable victims of past discrimination.[4]

Appellants, in their Opening Brief (Point III, pp. 17-20), stressed that these portions of the AAP&O were improper on the following grounds:

---

4. Paragraphs 33, 34 and 35 of the AAP&O (A. 1391-2) also provided for a procedure of admission and advanced placement in the apprentice program for non-whites possessing some experience, but unable to pass the journeyman's test. Appellants likewise appealed from these provisions of the AAP&O. However, inasmuch as the grounds urged for a determination of impropriety of these latter portions were similar to those urged in opposition to the direct admission procedures herein, the objections to the former were not separately stated in the Opening Brief and shall not be separately set forth herein (Opening Brief, pp. 17-20; p. 17, fn. 10).

1. The direct admission procedure, whether applied to all persons or only to non-whites, represents an unjustified circumvention of the admission procedures based on job-related, non-discriminatory journeyman's examinations, as well as, in some instances, disregard for the results of such an examination; and

2. The limitation of the direct admission program to non-whites who have not been shown to be victims of past discrimination constitutes an artificial preference based solely on race--a preference which this Court has previously held to be impermissible (see EEOC v. Local 28, supra).

Paragraph 12 of the Rev. AAP&O (A. 1842) is not at all responsive to appellant's first objection and is merely a cosmetic response to the second. The program does not involve the administration of a test, validated or otherwise. It continues the direct admission procedure as an alternative to successful completion of the journeyman's test for "persons" rather than "non-whites".

As stated in appellant's Opening Brief, Point III, pp. 17-19, the direct admission procedures, regardless of their availability to whites as well as non-whites, undermine the administration of a non-discriminatory, job-related

examination program, contrary to the intent of Title VII. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The arguments previously presented are of equal, if not greater, persuasiveness where the direct admission program is available to both whites and non-whites.

At first blush, it might appear that this revised provision eliminates any racial preference. However, closer analysis reveals that it will inevitably have a counter-productive impact upon the attainment of the racial goals established by the district court or result in the continuation of the impermissible racial preference. The admission of any whites through the direct admission program would, by definition, increase the total white population of the Union. This would frustrate efforts to attain the racial goals provided in the Affirmative Action Program.

Accordingly, this program would not only fail as a means of increasing the percentage of non-whites in the Union's population, but would actually reduce the non-white representation. The experience of all the parties in the selection of apprentices and in connection with the

results of the journeyman's test administered in October of 1975, clearly and convincingly illustrates that such counter-productive results would follow: in each of these instances of non-preferential selection/admission, the number of whites has been greater than that of non-whites.

Since the achievement of specified racial goals represents a primary purpose of the AAP&O, a direct admission program available to all persons is necessarily exposed to the risk that its administration will involve a preference for non-whites, although inadvertent and unintentional.

The potential of de facto racial preference in the direct admission procedures is sufficiently apparent so as to eliminate this program as a means of admission to Union membership, whether or not it is made available to both whites and non-whites. Cf. The racial composition of the Board of Examiners as proposed by plaintiffs and the Administrator. (Opening Brief, Point II, pp. 12-16; Supplemental Brief, pp. 6-7). For these reasons, the direct admission procedures should be stricken from the Rev. AAP&O.

C. Reductions and Installment Payments of Initiation Fees for Non-Whites

Paragraphs 16(a) and (b) and 17 of the AAP&O (A. 1384-86) provide for the reduction and installment payment of initiation fees for non-whites who qualified for membership in Local 28.

Appellants objected to these special dispensations (Opening Brief, Point V, pp. 22-23) on the grounds that they constituted artificial preferences based solely on race.

Paragraphs 13 and 14 of the Rev. AAP&O (A. 1843-1845) continue these provisions without change, and, consequently, for the reasons stated in appellants' Opening Brief, should be deleted.

D. The Requirement that the JAC Indenture Specified Number of Apprentices

Paragraph 22 of the AAP&O (A. 1387) requires that "no less than 300 apprentices by July 1, 1976 of which no less than 100 apprentices shall be indentured by February 2, 1976. No less than 200 apprentices shall be indentured in each year thereafter up to and including 1981." Appellants urged (Opening Brief, Point VI, pp. 24-27) that this mandate was unreasonable and improper on the grounds that:

1. It is an unwarranted infringement on the rights of Local 28 and the contracting employers who have traditionally negotiated the number to be indentured as part of the collective bargaining process;

2. It is inconsistent with the rationale of Griggs v. Duke Power Co., supra, because it denigrates the paramount selection criteria--the scores achieved on the non-discriminatory apprenticeship examination; and

3. It is unrelated to remedying the discrimination found and may well prove counterproductive to achieving the racial goal.

Paragraph 19(a) of the Rev. AAP&O (A. 1846) has eliminated the requirement of any fixed number of apprentices to be indentured by the JAC except for the class of February, 1977, which shall be comprised of 36 apprentices. Paragraph 19(b) further provides that the number of apprentices to be indentured for future classes be initially determined by the JAC, subject to review by the Administrator, "in accord with the goals and objectives of the Revised program." (A. 1846).

The current provision is subject to the same objections that appellants urged in regard to ¶ 22 of the AAP&O, in that the number of apprentices to be indentured in the program should be left to the collective bargaining process, consistent with the manpower requirements of the industry,

subject to the review of the Administrator and the Court only on the basis of a finding of discriminatory motivation or impact.

Furthermore, the employment of apprentices[5] is concededly beyond the control of the JAC, and is exclusively in the province of employers who may or may not employ apprentices. Consequently, it is an act of futility for the Administrator or the Court to direct the JAC to indenture any specified number of apprentices.

The Administrator and the district court recognized this situation by eliminating the original provision of the AAP&O (¶ 23; A. 1387) requiring that apprentices be assigned for employment in a ratio of not less than one apprentice for every four journeymen. The Administrator noted (Administrator's Report, p. 16, A. 1893):

> "However, control of the ratio rests with the individual employers and not with either the JAC or Local 28. The record is clear

---

5. The apprentice program consists of four years of training divided into eight semesters during which the apprentice is required to attend classes at the JAC school one day every two weeks; the other nine days are devoted to on-the-job training to the extent that employment is available.

> that employers are 'at liberty to employ and discharge whomever [they] shall see fit . . . .' (Standard Form of Union Agreement [Sheet Metal] 1975, Article V, Section 5). Since the Defendants have no ability to order any employer to hire apprentices, any ratio of this kind would be unenforceable."

Similarly, the district court approved the recommendation of the Administrator, stating (A. 1832):

> "An apprentice-journeyman ratio as originally contemplated must be discarded as a method of insuring non-white employment since it is not within the control of the parties to this action to maintain such a ratio."

The requirement that the JAC indenture specified minimum numbers of apprentices is similarly unworkable in that, once indentured, there is no way whatsoever to insure employment opportunity or training sufficient for a viable apprentice program. This was recognized by the Administrator, where he stated (Administrator's Report, p. 13, A. 1890):

> "Since neither the parties nor the court has any current ability to reach the individual employers who, in fact, control apprentice employment opportunities, there is no way to insure that all indentured apprentices will receive sufficient on-the-job training (employment) to keep them from dropping out of the program."

A direction to indenture a specified number of apprentices at any given time is unreasonable and unworkable for the same reasons that the Administrator and district court finally rejected the ratio concept.

For these reasons, it is respectfully urged that this Court modify the provisions of ¶ 19 of the Rev. AAP&O to provide that the number of apprentices to be indentured in the JAC program be determined in collective bargaining.

E. The Replacement of the Seniority System in the Apprentice Program With an Elaborate Rotation System

Paragraph 23 of the AAP&O required that:

> "Seniority shall not be a criterion for employment, and apprentices shall be rotated for employment where necessary and feasible." (A. 1387).

Appellants objected to any rotation system on the ground that it improperly discarded a bona fide seniority system which has never been found to be discriminatory, and on the further ground that it accorded preferential treatment ("bumping") to non-whites who were not identified as victims of past discrimination (Opening Brief, Point VII, pp. 31-32).

Paragraph 20(c) of the Rev. AAP&O (A. 1847) likewise eliminates the seniority system and provides for an elaborate grouping of various terms of apprentices for purposes of implementing a rotation system. Although

this kind of intra- and inter-group rotation is different from the initial rotation system provided in ¶ 23 of the AAP&O, the rotation concept that is to displace the JAC's non-discriminatory seniority system remains unchanged. Accordingly, appellants urge that ¶ 20 be eliminated from the Rev. AAP&O and that the JAC be permitted to retain its non-discriminatory seniority system.

F. Procedures for Journeyman Admission Extended to Persons not Residing in the City of New York

Paragraphs 10 (Journeyman Examination) and 15 (Direct Admission) of the AAP&O (A. 1379, 1382) extended eligibility for admission to journeyman membership in Local 28 to persons residing outside the City of New York. Paragraphs 7 and 12 of the Rev. AAP&O (A. 1839, 1842) continue these provisions without change.

For the reasons set forth in the Opening Brief (Point VIII, pp. 33-35), appellants continue to object to the extension of eligibility to persons who reside outside the City of New York.

IV.

CONCLUSION

Based on all of the foregoing, it is respectfully submitted that this Court vacate so much of the Revised Affirmative Action Program and Order of the district court as has been appealed from herein.

Respectfully submitted,

SOL BOGEN, ESQ.
Attorney for Defendants-Appellants
Sheet Metal Workers' International
Association, Local Union No. 28,
and Local 28 Joint Apprenticeship
Committee
One Pennsylvania Plaza
New York, New York 10001

February 18, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and THE CITY OF NEW YORK,

Plaintiffs-Appellees,

-against-

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Defendants-Appellants,

SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

- x

LOCAL 28,

Third-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

- x

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROSEMARY M. WALCZYK, being duly sworn, deposes and says:

1. I am not a party to this action and am over 18 years of age.

2. On February 18, 1977, I served the annexed supplementary brief for defendants-appellants on the parties set forth on the attached list by depositing a true and correct copy thereof enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service at 345 Park Avenue, New York, New York 10022.

Rosemary M. Walczyk
ROSEMARY M. WALCZYK

Sworn to before me this
18th day of February, 1977.

Julia M. Ross
Notary Public

JULIA M. ROSS
Notary Public, State of New York
No. 24-8666410
Qualified in Kings County
Commission Expires March 30, 1978

Honorable Robert B. Fiske, Jr.
United States Attorney for the
Southern District of New York
U. S. Courthouse
Foley Square
New York, New York 10008
Attention: Louis G. Corsi, Esq.
Assistant U. S. Attorney
Attorney for Plaintiff
Equal Employment Opportunity Commission

Honorable W. Bernard Richland
Corporation Counsel, City of New York
Municipal Building
New York, New York 10007
Attention: Ellen Sawyer, Esq.
Assistant Corporation Counsel
Attorney for Plaintiff
City of New York

Honorable Louis J. Lefkowitz
Attorney General, State of New York
Two World Trade Center
New York, New York 10047
Attention: Dominick Tuminaro, Esq.
Attorney for Third and Fourth-Party Defendants
New York State Division of Human Rights

Rosenthal & Goldhaber
44 Court Street
Brooklyn, New York 11201
Attention: William Rothberg, Esq.